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In the

SUPREME COURT of the UNITED STATES

October Term, 1976

No. 76-558

RAYMOND MOTOR TRANSPORTATION, INC.,
a Minnesota Corporation

and

CONSOLIDATED FREIGHTWAYS CORPORATION
OF DELAWARE
a Delaware Corporation,

Appellants,

vs.

ZEL S. RICE, ROBERT T. HUBER, JOSEPH
SWEDA, REBECCA YOUNG, WAYNE VOLK,
LEWIS V. VERSNIK, and BRONSON C.
LA FOLLETTE,

Appellees.

*On Appeal From The United States District Court
For The Western District of Wisconsin*

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

I. OPINION OF THE COURT BELOW

The opinion of the District Court for the Western District of Wisconsin is published at 417 F. Supp. 1352. A copy of the opinion is printed in the Jurisdictional Statement as Appendix A. References to the opinion of the District Court in this brief are to the appropriate page of the Jurisdictional Statement.

II. JURISDICTION

This action was brought under 28 U.S.C. §§1331, 1332, 1343, 2201 and 2202, and 42 U.S.C. §1983 to invalidate and enjoin enforcement of a regulation of the State of Wisconsin which bans the use of twin trailer vehicle combinations on Interstate Highways. The state regulation was alleged to violate the commerce clause and the Fourteenth Amendment to the United States Constitution.

On August 13, 1976, the District Court granted judgment for the defendants. Notice of Appeal was filed by appellants on September 29, 1976, in the United States District Court for the Western District of Wisconsin. A copy of the Notice of Appeal is set forth in Appendix B to the Jurisdictional Statement.

Jurisdiction of the Supreme Court to review this decision by direct appeal was conferred by 28 U.S.C. §1253¹. Under 28 U.S.C. §2101(b) a direct appeal under 28 U.S.C. §1253 must be taken within 60 days of a final judgment. This Court noted probable jurisdiction on March 7, 1977.

¹28 U.S.C. §2281, which mandated a three-judge court in this case has been repealed, but it does not affect the requirement of direct appeal to the Supreme Court for cases commenced before August 12, 1976, Pub. Law 94-381 (August 12, 1976).

III. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The United States Constitution provides:

"The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States . . ."
Art. I, §8.

. . .

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV

§Hy 30.14 (3)(a), Wisconsin Administrative Code, reads as follows:

(a) Trailer-train permits shall be issued only for the operation of vehicles used for the transporting of municipal refuse or waste, or for the interstate or intrastate operation without load of vehicles in transit from manufacturer or dealer to purchaser or dealer, or for the purpose of repair.

Other relevant statutes and regulations are set forth in the Appendix to this brief.

IV. QUESTIONS PRESENTED

A. Does Wisconsin's refusal to permit twin trailers on the Interstate Highways in Wisconsin violate the commerce clause by placing a burden on interstate commerce which outweighs any legitimate local interest?

B. Does the Wisconsin regulatory scheme for vehicles unconstitutionally discriminate against interstate commerce?

V. STATEMENT OF THE CASE

Appellant Consolidated Freightways Corporation of Delaware ("Consolidated") is a large general commodity carrier, operating in 45 states under authority granted by the Interstate Commerce Commission. Appellant Raymond Motor Transportation, Inc. ("Raymond") is a small general commodity carrier which has Interstate Commerce Commission authority to pick up and deliver freight in the States of Illinois, Minnesota, and North Dakota.

Where permitted, both Appellants utilize twin trailer vehicles in their operations.¹ Twin trailers offer significant advantages to general commodity carriers. They allow carriers to substitute transfer of trailers for transfer of cargo causing dramatic reductions in transit time and operating costs. The low density of general commodity freight enables carriers to utilize the additional volume of twin trailer combinations,² thereby reducing equipment

¹The twin trailer vehicle combination at issue here consists of a tractor and two 27-foot trailer units. Total length of the combination is 65 feet. The first trailer is attached to the tractor in a manner similar to that of a conventional semi-trailer. The front of the second unit rides upon a dolly attached to the rear of the first. A schematic representation of a twin trailer combination is reproduced in the District Court's decision at page 23a of the Jurisdictional Statement. The Appendix contains a photograph of a twin trailer at p. 276. Because shorter trailers would be less stable, 27-foot trailers have become the industry standard (A. 81-82, 324). The length of two 27-foot trailer units and a tractor is 65 feet.

²Twin trailer combinations have 53 linear feet of available cargo space; 55 foot semi-trailer combinations have 39.5 linear feet of available cargo space (A. 373).

costs, energy consumption, and operating costs. These advantages have resulted in twin trailers becoming the industry standard for interstate carriage of general commodity freight (A. 323-324).

By statute and administrative regulation Wisconsin generally prohibits vehicles in excess of 55 feet in length and vehicles having more than one trailer.⁴ However, under a complex permit system, the Wisconsin Highway Commission routinely issues large numbers of various types of permits for the operation of oversized vehicles up to 85 feet in length and vehicles having more than one trailer. Were it not for §Hy 30.14(3)(a) of the Wisconsin Administrative Code, which limits trailer train permits to certain specified purposes, the Highway Commission would have the power to grant permits to appellants for the operation of 65-foot twin trailers in interstate commerce and limit such operation to designated Interstate Highways.⁵

Wisconsin's ban forces carriers to use one of three alternatives to maintain system traffic along the principal northern East-West interstate route, choosing among the alternatives according to operating factors. Appellant

⁴WIS. STAT. §§348.07(1), 348.08 (1975). WIS. ADMIN. CODE §Hy 30.01(3)(c).

⁵WIS. ADMIN. CODE §Hy 30.14(3)(a) states:

"(3) General Limitations On The Issuance of Trailer-Train Permits. The issuance of trailer-train permits shall be subject to the general limitations stated in Wis. Adm. Code sections Hy 30.01(3)(c) 2 and 4, and the following:

(a) Trailer-train permits shall be issued only for the operation of vehicles used for the transporting of municipal refuse or waste, or for the interstate or intra-state operation without load of vehicles in transit from manufacturer or dealer to purchaser or dealer, or for the purpose of repair.

Consolidated maintains staging areas near the Wisconsin state line in Illinois and Minnesota where twin trailer combinations may be separated, and an additional tractor added so that the individual trailer units can be hauled singly through Wisconsin to the opposite border where they are recombined. Both Appellants use semi-trailer equipment on routes having a Wisconsin segment, even though twin trailers are legal on the majority of the route (A. 311-314, 371-372). Finally, Appellant Consolidated diverts traffic from the most direct routing through Wisconsin and routes it through Missouri to avoid the Wisconsin ban (A. 307-314). Each of these alternatives results in diminution of the quality and availability of service and increased cost of service in other states as well as Wisconsin.

The Appellants applied to the Wisconsin Highway Commission for permits to allow them to operate twin trailers on the principal Interstate Highway routes through Wisconsin.⁶ The Highway Commission denied the permits on the basis of WIS. ADMIN. CODE §Hy 30.14(3)(a). Appellants then brought suit in the District Court for the Western District of Wisconsin, alleging that the state's refusal to issue permits was a violation of the equal protection clause of the Fourteenth Amendment and the commerce clause.

⁶The highways in question are Interstate Highways 90, 94 and 894. Interstate 94, in conjunction with Interstate 90, provides a four-lane, limited access highway from Detroit, Michigan to Seattle, Washington. Twin trailers are permitted the length of Interstate 94 save for the segment in Wisconsin. Interstate 894 is an alternate or by-pass route in Milwaukee County, Wisconsin. Both Interstate 90 and 94 run from the southern border of Wisconsin in a generally northwesterly direction to Wisconsin's western border with Minnesota. Appellant Consolidated also requested permits to operate twin trailers on four-lane connecting roads to two Wisconsin terminals located near the Interstate Highways.

A three-judge Court was impanelled on April 24, 1975. By stipulation of counsel, trial was by the submission of affidavits, depositions, and exhibits without live testimony (A. 29).⁷ The District Court denied the requested relief basing its decision upon its determination that regulation of motor vehicle length and type is within the province of the state legislature, and that the burdens thereby imposed on interstate commerce are not unconstitutional. In addition, the District Court held the state's regulatory scheme to be neutral and nondiscriminatory. The District Court found it unnecessary to consider whether less burdensome alternatives were available to the State than the total ban of twin trailers from all highways.

VI. SUMMARY OF ARGUMENT

The appropriate standard to determine constitutionality of a state regulation of commerce is the balancing test contained in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). To be valid, the state regulation must meet each of the elements of that test: (1) it must be non-discriminatory; (2) the local interest served must outweigh the burden on commerce; and (3) the regulation must be the least burdensome alternative available.

⁷The District Court's opinion does not contain detailed findings of fact separate from its conclusions. If this Court deems it necessary it may remand for further specific findings of fact, or may determine the undecided questions itself from the record, *Gerdes v. Lustgarten*, 266 U.S. 321, 327-328 (1924); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926). Inasmuch as plaintiffs sought injunctive relief, will sustain substantial financial and intangible damage as a result of delay, and inasmuch as the lower court did not rest its decision on the demeanor and credibility of the witnesses, it would be appropriate for this Court to follow the latter course.

Wisconsin's regulatory scheme for the size and weight of motor vehicles discriminates against interstate commerce. It does so directly by allowing industries in Wisconsin to use oversize vehicles for operation between plants or from plants to the state line, while denying similar exemptions to the industries of other states. It does so indirectly under a permit system which exempts industries of importance to Wisconsin from the size and weight limitations while retaining those limits for industries not important to Wisconsin. Moreover, Wisconsin places special limitations on twin trailers, a type of equipment which is principally used in interstate commerce.

Wisconsin's refusal to permit twin trailers on Interstate Highways causes Wisconsin to be an "island", imposing an artificial and unnatural barrier to motor carriage over the principal interstate route between Detroit and Seattle. The barrier thus created disrupts and fragments a national system for the interstate carriage of general commodities. Wisconsin's geographic location prevents accommodation by carriers on a regional basis. Carriers are forced to divert traffic around Wisconsin, operate semi-trailers in states where twin trailers are allowed, and operate staging areas where twin trailers can be separated to be hauled individually through Wisconsin.

These alternatives cause increased operating costs and delays, not just for Wisconsin shippers, but for shippers in other states as well. Energy consumption is increased by the use of inefficient equipment, indirect routes, and the necessity of moving twin trailers separately through Wisconsin. Incompatible equipment reduces the possibility of shifting equipment from routes through Wisconsin to other states and reduces or eliminates the

practice of interchanging equipment with other carriers in the motor transportation system.

These burdens are not justified by safety considerations. The evidence on safety is uncontradicted and overwhelming. Appellants submitted expert testimony, tests, actual experience of other states, and statistical surveys conclusively showing that twin-trailers are as safe or safer than the typical semi-trailers now operated in Wisconsin. The sole safety factor cited by the District Court in its opinion is unsupported by the record and against the clear weight of the evidence.

The District Court founded its conclusions on presumptions contained in cases decided before *Pike v. Bruce Church, supra*. Those presumptions, that state regulations of motor vehicles for safety purposes are valid and that size is inherently tied to safety, were rebutted by the evidence in this case. Moreover, they are inappropriate to apply under *Pike* which requires a determination of the facts of each case. Finally, the District Court failed to consider whether there were reasonable alternatives to Wisconsin's total prohibition of twin trailers. The relief requested in this case, use of twin trailers by permit on Interstate Highways, is a reasonable alternative that preserves the state's local interest while removing a significant burden from commerce.

Application of the *Pike* standard to state regulation of motor vehicles will not result in widespread invalidation of state regulations. It will permit a delicate and precise balancing of state and national interests that could not otherwise be accomplished.

VII. ARGUMENT

A. THE APPROPRIATE LEGAL STANDARD TO BE APPLIED IS A BALANCING OF THE STATE'S LOCAL INTERESTS AND THE BURDEN ON INTERSTATE COMMERCE.

Since the inception of this nation, there has existed an inherent conflict in our federal system between the power of the states to regulate commerce for the protection and benefit of their citizens and the need for commerce between the states to be free and unhindered. The replacement of the Articles of Confederation with the Constitution was an immediate result of the country's dissatisfaction with the prior resolution of that conflict in favor of the powers of the individual states.⁸

The commerce clause clearly gave Congress power to regulate interstate commerce. The far more difficult question is to what extent the grant of power to the national government limited the powers of the states to regulate interstate commerce. That is the question presented in this case, and is one which this Court has been unable to answer decisively and precisely in the course of our history.

⁸"The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony' and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states. Documents, *Formation of the Union*, H.R. Doc. No. 398, 12 H. Docs., 69th Cong., 1st Sess., p. 38." *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, p. 533 (1949); see also, *THE FEDERALIST*, No. XLII.

This court's most recent enunciation of the standard to be applied in determining whether a state regulation violates the commerce clause is a balancing test:

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Such a balancing test offers none of the advantages of a fixed standard. Cases decided under it are of little value as precedent. By failing to provide a firm legal rule, it delegates to the courts decisions of policy which our system normally reserves to elected representatives. Its virtue, however, overcomes its faults. Unlike every attempt of this Court to enunciate a fixed standard, the balancing test of *Pike* has been successful in accommodating the competing policy interests.

When the difficulties are considered it is not surprising that the Court has been unable to enunciate a fixed standard which has endured. Regulation of domestic and foreign commerce is a principal function of government, and division of the authority to regulate commerce among the

governments in the federal system is bound to be difficult.⁹ Moreover, commerce in this country has undergone rapid development and change which has increasingly intertwined intrastate, interstate, and foreign commerce.

There have been two major attempts to develop a fixed standard for delineating the powers of the states from those of the federal government. The first was initiated in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851):

"Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule . . . and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

. . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." 53 U.S. 299, 319.

To determine the constitutionality of state regulation under *Cooley*, it was only necessary to properly categorize each area of commerce, then determine whether state or federal regulation was appropriate.

⁹"It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 238 (1824) (Justice Johnson, concurring).

The difficulty with the method lay in the categorization.¹⁰ The blending of the powers and of the policy interests made the test in *Cooley* unworkable, for within the same subject matter the magnitude of the national interest might vary substantially. Thus, in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 53 U.S. (13 How.) 518 (1851) the Court struck down, in part on interstate commerce grounds, a state statute which permitted the building of a bridge which impeded interstate traffic on the Ohio River. In *Escanaba and Lake Michigan Transportation Company v. Chicago*, 107 U.S. 678 (1882), however, the Court upheld a Chicago ordinance which impeded interstate traffic on the Chicago River by prohibiting bridge openings during rush hour. The conflicting results cannot be attributed to differing subject matter, but rather to the differing weights accorded the burden on national commerce and the local interest in each case.

The Court's second attempt to determine a fixed standard was firmly founded in constitutional theory. States could not regulate interstate commerce directly, having surrendered that power to the federal government, but they retained the power to regulate their own commerce. Limited regulation of interstate commerce incidental to the exercise of that retained power would be permissible. Constitutionality thus depended upon whether the

¹⁰It was not by happenstance that the original simile of "a grey area of the law" was created by Chief Justice Marshall in delineating state from federal power over commerce.

"The power [to tax commerce] and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441 (1827).

regulation was direct or indirect. The theory was sound, but the application impossible. Justice Stone succinctly summarized the actual experience under the "direct-indirect burden" test:

"In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Justice Stone dissenting).

Justice Stone's suggested alternative, the consideration of the policy interests in each individual case, has evolved into the balancing test of *Pike*.

Pike establishes a three part test. To be upheld, the state regulation must first be found to be nondiscriminatory. Then, the "legitimate local interests" must be determined to outweigh the burden on commerce. Finally, the regulatory alternative selected must be the least burdensome available.

B. WISCONSIN'S REGULATORY SCHEME DISCRIMINATES AGAINST INTERSTATE COMMERCE THUS VIOLATING THE COMMERCE CLAUSE AND FOURTEENTH AMENDMENT.

A common thread in commerce cases has been the prohibition of discrimination between local and interstate commerce. Every major Supreme Court case applying the commerce clause to motor transportation has reiterated the requirement that the state regulation be non-discriminatory:

"But so long as the state action *does not discriminate*, the burden is one which the Constitution permits . . ." *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177, 189 (1938). (Emphasis added)

"In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe *uniform* regulations adapted to promote safety upon its highways and the conservation of their use *applicable alike to vehicles moving in interstate commerce and those of its own citizens*." *Morris v. DUBY*, 274 U.S. 135, 143 (1927). (Emphasis added)

"In the instant case, there is no *discrimination against interstate commerce* . . ." *Sproles v. Binford*, 286 U.S. 374, 390 (1932) (Emphasis added)

"We . . . have upheld state statutes applicable *alike to interstate and intrastate commerce* . . . This is one of those cases — few in number — where local safety measures that are *non-discriminatory* place an unconstitutional burden on interstate commerce." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523, 529 (1959). (Emphasis added)

That prohibition is repeated in *Pike*'s statement of the balancing test:

"(T)he general rule that emerges can be phrased as follows: Where the statute regulates *evenhandedly* . . ." 397 U.S. at 142. (Emphasis added)

This requirement is the compelling result of both constitutional theory and practical experience.

In constitutional theory, the grant by the states to the federal government of the authority over interstate commerce was a surrender of that power by the states. The state might incidentally regulate interstate commerce but could not do so directly. If the state were to discriminate,

it would regulate interstate commerce separately, and thus directly. The state would exercise a power that it no longer possessed.

The practical lesson has been repeated throughout our history. States, as democratic governments, will legislate for the benefit of their constituents. If permitted, they will discriminate against the commerce of other states for their own economic advantage. The constituency is too small, and the viewpoint too narrow for it to be otherwise. The long litany of Supreme Court cases striking down state legislation beneficial to one state's commerce, but inimical to the commerce of the nation, shows that this tendency to fragment the economy is inherent and endures.

Wisconsin's regulatory scheme for limiting the size and weight of motor vehicles violates the constitutional theory and reiterates the historical lesson. The discrimination is not the conscious and intended objective of the legislature, but the natural result of Wisconsin acting for the benefit of its citizens and industries.

The state's regulatory scheme governing the size and weight of motor vehicles is neither simple nor clear in its statutory framework, administrative regulations, or interpretation of either. It suffers from an abundance of statutory and administrative amendments which respond to particular problems with little regard for the structure as a whole.

By statute, Wisconsin has imposed length (55')¹¹, height (13.5')¹², width (8')¹³ and weight (73,000 lbs.)¹⁴ limits on vehicles in Wisconsin. Wisconsin has created three classes of exemptions to these limits.

The first class of exemptions requires no permit approval by the Highway Commission. Included within this class are: overwidth exemptions for loads of hay bales, pulpwood, tie logs, tie slabs, and veneer logs¹⁵; overlength exemptions for mobile homes to sixty feet¹⁶ and tour trains¹⁷; and overweight exemptions for pulpwood in winter¹⁸ and a special and favorable method of determining pulpwood weight¹⁹.

In the second class are specific statutory exemptions which require permit approval by the Highway Commission. Included in this class are: oversize permits for

¹¹WIS. STAT. §348.07(1) (1975).

¹²WIS. STAT. §348.06(1) (1975).

¹³WIS. STAT. §348.05(1) (1975).

¹⁴WIS. STAT. §348.15(3)(d) (1975).

¹⁵WIS. STAT. §§348.05(2)(k) and (1) (1975).

¹⁶WIS. STAT. §§348.07(2)(d) (1975).

¹⁷WIS. STAT. §348.07(2a) (1975).

¹⁸WIS. STAT. §348.175 (1975).

¹⁹WIS. STAT. §348.19(1)(b) 1975. Exemptions are also provided for necessarily oversize loads such as farm equipment temporarily operated on the highways, or snow plows. WIS. STAT. §§348.05(2)(a)-(b), 348.06(2), 348.07(2)(e) (1975). Appellant has no objection to these exemptions of necessity.

mobile homes, trailer trains, interplant operations, automobile carriers, pulpwood²⁰, and agricultural machinery²¹; overweight permits for metal scrap²², and milk or fuel during an energy emergency²³.

Finally, the legislature has provided the Highway Commission with general authority to issue permits for oversize and overweight loads²⁴. Under this general authority the Highway Commission has provided by regulation for the issuance of such oversize permits as those allowing new sixty-five foot twin trailers being shipped to or from a dealer, or for repair²⁵, and permits for fifty-five foot twin tank trucks for hauling dairy products²⁶.

²⁰WIS. STAT. §§348.26(3-4), 348.27(4-7), (9) (1975). Pulpwood permits for 65 foot trucks are provided for companies hauling "peeled or unpeeled forest products" for use in their business, §348.27(5), or for any length of truck within 3 miles of the Michigan border, §348.27(9).

²¹WIS. STAT. §348.25(4)(b) (1975). Unlike the exemption of necessity for single agricultural implements, this exemption permits up to a sixty-foot long load of two items of agricultural machinery. Wisconsin Manufacturers of agricultural machinery such as J.I. Case Co. and Deere and Company may obtain permits under this section for shipment of their products. This exemption was enacted after trial of this case; Ch. 66, 1975 Wis. Laws.

²²WIS. STAT. §348.27(7m) (1975).

²³WIS. STAT. §348.27 (8) (1975).

²⁴WIS. STAT. §§348.26(2), 348.27(3) (1975).

²⁵WIS. ADMIN. CODE §Hy 30.14(3)(a) There is a Wisconsin manufacturer of twin trailers who routinely uses permits under this section for shipping sixty-five foot twin trailers, identical to those used by appellants, to buyers out of state (A 210-212).

²⁶WIS. ADMIN. CODE §§Hy 30.18(3)(a), 30.01(3)(c). The proposed regulations permitting transport of milk in fifty-five foot twin tank trailers were brought to the attention of the District Court at oral argument. They became effective on July 1, 1976. The dairy industry did not need sixty-five foot vehicles because gross load limitations are exceeded before the volume of a fifty-five foot twin tank truck is exceeded.

That general power is limited only by the requirement that the oversize or overweight load by one which "cannot reasonably be divided or reduced to comply with statutory size, weight or load limitations"²⁷. The Highway Commission, however, has interpreted "reasonably be divided" in an economic sense, and routinely grants oversize permits for loads that can be physically, but not economically, divided (A. 194-195, 200, 202-204, 210-212, 215-216, 258-261). These loads have included beer cans (A. 194, 228-232), car bodies (A. 259-260), car frames (A. 199-200), and small boats (A. 205, 232-234). These exemptions have freed much of Wisconsin's commerce from the burden of the regulatory scheme, while retaining that burden on interstate commerce.

1. Exemptions Are Granted Wisconsin Industries But Denied to Foreign Industries.

One type of exemption is blatantly discriminatory and violates both the Fourteenth Amendment and the commerce clause. The Highway Commission is authorized to issue permits to industries and their agents to operate oversize vehicles "in connection with interplant, and from plant to state line, operations in this state"²⁸. The Commission has interpreted this statute to permit the issuance of permits only to industries with a plant in Wisconsin, thus making the exports and interplant traffic of Wisconsin manufacturers exempt from size limits while imposing those same limits on foreign manufacturers shipping through or to Wisconsin. Usage of permits under this section is extensive. American Motors, for instance,

²⁷WIS. STAT. §348.25(4)(1975).

²⁸WIS. STAT. §348.27(4) (1975).

uses industrial interplant permits to run a continuous shuttle of trucks carrying car bodies over a distance of forty-five miles (A. 195-196). Joseph Schlitz Brewing Co. uses an interplant permit to transport empty beer cans in trucks to its canning facilities in Milwaukee (A. 228-232).

The District Court found the interplant exemption to be non-discriminatory, concluding that the Commission interpreted the statute to allow permits to be granted to residents or non-residents (Jurisdictional Statement, p. 9a, f.n. 9). The District Court reached its determination on the basis of Exhibit 5 to the deposition of Robert R. Weaver, Permit Supervisor for the Division of Highways. Exhibit 5 is a general review of policies regarding permits and states "permits are issued . . . without regard to whether the applicant is a resident of Wisconsin or not." (A. 264) The District Court apparently overlooked the following testimony of Mr. Weaver:

Q. . . . Were you responsible for the Department correspondence indicating the unavailability of a permit for the Godfrey Conveyor Company of Elkhart, Indiana, to transport loads of boats in excess of fifty-five foot length limits in Wisconsin?

A. Yes.

Q. And did you hear Mr. Volk's testimony to the effect that such a permit could have been issued to the Godfrey Conveyor Company, Inc. if it were a manufacturer located at a Wisconsin point transporting such divisible loads of boats overlength to the Wisconsin State line or to a point in Wisconsin?

A. Yes, if it were within the terms of the Industrial Interplant Permit under 348.27 (4).

Q. If the manufacturer of boats in a Wisconsin point sought the very same authorization as sought by the Indiana firm, would the permit be granted?

A. In other words the Indiana firm actually had his business, the manufacturer of boats, in Wisconsin, correct?

Q. Right.

A. Yes.

Q. The permit would then issue?

A. That's right.

Q. To that extent this would be an exception to the statement contained in Exhibit 5 with respect to the effect of the policy as between Wisconsin and non-Wisconsin residents?

A. Um-hum.

Q. Yes?

A. Yes." (A. 257-258)

Defendants' Brief in the lower Court conceded that such permits were only granted to Wisconsin industries or their agents (Defendants' District Court Brief, p. 7).

2. Exemptions to Wisconsin's Regulatory Scheme Are Designed to Meet the Needs of Local Commerce, But Not the Needs of Interstate Commerce.

Wisconsin's regulatory scheme is also discriminatory in a more subtle fashion. Where the limits have restricted or constrained Wisconsin industries, an exemption has been granted.²⁹ Wisconsin is a major producer of automobiles, automobiles may be transported in 65' trucks; Wisconsin is a major dairy state, the dairy industry benefits from twin tank trucks; Wisconsin has an important paper industry, the paper industry benefits from exemptions for the hauling of pulpwood. Wisconsin balances the economic and political importance of the local industry with the state's desire in maintaining its regulatory

²⁹Usage of those exemptions by Wisconsin industry is large. June 1st, 1975 figures (which do not include the new dairy exemption and the expanded agricultural implement exemption) showed a total of 12,168 general permits in force (A. 172-182). In 1972, the State estimated there were a total of approximately 38,000 single trip permits (A. 263). In 1975, 3,077 of the general permits were for 65 foot automobile transporters (A. 179). One company with a fleet of only 52 automobile transporters operated 6,376,305 miles in Wisconsin in 1974 (A. 275).

scheme. The exemptions created may apply to both interstate and local commerce, but the exemptions are tailored to Wisconsin's industry, and national commerce is benefitted only to the extent that its industries and patterns of trade duplicate Wisconsin's.³⁰ It is an equality akin to that of requiring all people to wear size nine shoes; comfortable for some, but binding on others.

³⁰That the resultant exemptions are biased is demonstrated by the following table which shows the proportion of Wisconsin's total manufacturing shipments which are produced by the major Wisconsin industries granted or benefiting from exemptions other than interplant permits:

	% of Value of Wisconsin Manufacturing Shipments
Motor vehicles and equipment (65' motor vehicle transporters)	11.13
Mobile homes and Prefabricated Wood Buildings (overlength and overwidth permits)60
Dairy Products (55' twin trailer tank trucks for milk, the raw material in dairy products)	9.88
Paper and allied products (beneficiaries of overlength, overwidth, and overweight permits for pulpwood, the raw material in paper manufacture)	9.29
Farm Equipment (exemption for overlength loads of implements)	1.88
TOTAL	32.78

Thus a total of approximately 32% of Wisconsin's manufacturing shipments are possibly benefited by exemptions as to the size or type of vehicles permitted. The Wisconsin "bias" in exemptions can be seen by the fact that nationally these possibly benefited industry groups create only 18% of all manufacturing shipments. (Data extracted from *1972 Census of Manufacturers*, U.S. Census Bureau).

Defendants in their Lower Court brief conceded that Wisconsin had fashioned its exemptions to benefit industries important to Wisconsin, arguing that the promotion of local industries was a proper exercise of the State's police power (Defendant's Brief pp. 8-10).

This subtle discriminatory pattern is reflected not only in exemptions to the weight and size limits tailored for Wisconsin's industries, but in the specific prohibition of twin trailers. The advantages of twin trailers are of principal importance to interstate general commodity carriers³¹ (A. 323-324). Wisconsin's prohibition on twin trailers thus burdens interstate commerce while imposing only slight burdens on local commerce. Because interstate rates are regulated by the Interstate Commerce Commission and are set on a regional basis, Wisconsin shippers benefit from the economic advantages of twin trailers permitted in other states, while shippers in other states must pay the extra costs of Wisconsin's ban (A. 351-359).

Such subtle discrimination is generally beyond the reach of the Fourteenth Amendment, but it is not and should not be beyond the reach of the commerce clause. This Court has held that the commerce clause forbids both discrimination which is blatant and that which is the result of a facially neutral proscription:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940).

If such subtle discrimination were permissible, each state could, and given the practicalities of politics, would, legislate so as to provide exemptions for its local industries from its general regulations of commerce. The result

³¹The advantages of twin trailers are discussed at pp. 29-34, *infra*. Many of these advantages, such as the ability to consolidate freight for long distance movement, are of only limited utility to local intrastate carriers.

would be to rekindle economic rivalry and animosity among the states, and, in the end, to divide a national economy into fifty individual economies.

C. WISCONSIN'S PROHIBITION OF TWIN TRAILERS IMPOSES A HEAVY BURDEN ON INTERSTATE COMMERCE BY DISRUPTING AND FRAGMENTING A NATIONAL TRANSPORTATION SYSTEM.

1. Transportation Systems Are Peculiarly Vulnerable to Burdens Imposed by Varying State Regulation.

The second recurring statement contained in the commerce clause cases, regardless of the standard used, is that protection is necessary from individual state regulation in the field of transportation. The interstate transportation of goods is at the core of the protection of the commerce clause.³² Moreover, interstate transportation of goods is simultaneously an area of commerce where the need for regulation is most compelling, and the effects of contradictory and disjointed regulation most disastrous.

This Court has long recognized the destructive effect of conflicting regulation on transportation. As each method of interstate transportation became important to the nation's economy the Court extended to it the protection of the commerce clause from burdensome regulation by the individual states. *Gibbons vs. Ogden*, 22 U.S. (9 Wheat.)

³²"[T]his power [over shipping] has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation." *Gibbons vs. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

1 (1824), the first important commerce clause case, recognized the embarrassment that our waterborne commerce would be subjected to by conflicting federal and state laws. A similar protection was afforded to railroads when they developed into a national system of transportation:

"By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the various harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territory of half a dozen States, through which they are carried without change of car or breaking bulk.

. . .

"But when it is attempted to apply to transportation through an entire series of States a principal of this kind [state regulation], and each one of the States shall attempt to establish its own rates of transportation, own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois Court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution." *Wabash, St. Louis and Pacific Railway Co. v. Illinois*, 118 U.S. 557, 596 (1886).

We respectfully submit to the Court that motor carriers now form another national system of commerce. Certainly, that has been the thrust of federal regulation of rates, and the intent of Congress:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . to the end of developing, coordinating, and preserving a *national transportation system* by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, . . ." National Transportation Policy of 1940, 54 Stat. 899 (Emphasis added)

Wisconsin's refusal to permit twin trailers on the Interstate Highways in Wisconsin imposes a heavy and unnecessary burden on the national motor transportation system. Because of the interstate nature of the system and the geographic location of Wisconsin, its prohibition disrupts and fragments the entire system.³³

2. Wisconsin's Prohibition Imposes Direct and Indirect Burdens on Interstate Commerce.

³³Other states ban twin trailers; but these states, with the exception of Iowa, are contiguous and are located in the Southeast or Eastern Seaboard. They can be adjusted to on a regional basis. Wisconsin's geographic location and its location on Interstate 90 and 94 make it an island blocking the commercial routes from the industrial Midwest to the Pacific Northwest. The presence of the Great Lakes and the location of the Interstate Highways prevents any easy routing around Wisconsin. The result is a massive disruption and fragmentation of the system.

Iowa, which permits 60 foot twin trailers, enacted administrative regulations to permit 65 foot twin trailers throughout the state. These regulations were recently struck down as improperly promulgated, *Motor Club of Iowa v. Department of Transportation et al*, 251 N.W.2d, 510 (March 17, 1977). Iowa's ban has never had the same deleterious effect that Wisconsin's ban has had. Iowa through traffic can easily be rerouted through Missouri; Wisconsin's traffic cannot because of distance.

To understand the nature of that burden and why it causes disruption, it is first necessary to understand the operations of the system. General commodity carriage is one part of the motor transportation system. Appellant Consolidated's operations are typical of the operations of general commodity carriers. A general commodity carrier does not usually provide individual trucks to its customers for their use. Rather it normally picks up and transports a variety of shipments in one vehicle to destinations throughout its route, or through the process of interlining or interchanging trailers with other general commodity carriers, to points outside its route structure. The average weight of a shipment on Appellant Consolidated's routes in 1974 was 992 pounds (A. 306), or less than 3% of the total weight of an average vehicle load (A. 323).

General commodity carriers serve most industries and localities, but they are particularly important to small businesses and small communities which often have no other practical means of shipping and receiving goods (A. 361-362). For example, Consolidated operates terminals in towns as small as Fargo, North Dakota, population 53,365, which in turn serves towns as small as Zap and Adams, North Dakota, population 271 and 264 respectively (A. 328). Appellant Raymond picks up and delivers the production of small local industries such as Franklin Manufacturing (freezers and refrigerators) in St. Cloud, Minnesota and Medallion Kitchens (kitchen cabinets) in Fergus Falls, Minnesota (A. 378).

The principal problems in the operation of general commodity carriers are those created by need to repeatedly consolidate shipments for movement (A. 318). The basic pattern for movement of an average (small or less-than-truckload) shipment, is as follows:

1. Pick up from the shipper;
2. Consolidate at the origin terminal with other shipments moving in the same general direction;
3. Dispatch the consolidated trailer to a "break-bulk" terminal;
4. Unload at the intermediate or "break-bulk" terminal and reconsolidate the shipment with others moving to the immediate area of the destination terminal;
5. Dispatch the over-the-road trailer to the destination terminal;
6. Unload the over-the-road trailer and reconsolidate with shipments for a logical local delivery service; and
7. Deliver the shipment to the consignee.

Where consolidation requires removal of freight from one trailer, sorting, and reloading of freight into another trailer, there are significant delays, costs, and exposure of freight to loss or damage. This "cross-dock handling" is the single most costly element in general commodity carriers' operations (A. 334).

Pick up and delivery of freight is frequently done by straight trucks because of small load size, loading space restrictions, and location of shippers in congested downtown areas. Use of straight trucks adds another layer of equipment to the carriers' operations and necessitates unloading of cargo from the straight truck and reloading into long distance equipment.

Twin trailers offer significant advantages for pick up and delivery of freight. A twin trailer combination can be separated and a single twenty-seven foot trailer and tractor dispatched in place of a straight truck for pick up and delivery. In many instances cross-dock handling can be reduced, by using the same trailer with some of its

original freight for over the road movement.³⁴

Similarly, twin trailers facilitate the consolidation of freight for long distance movement. The optimum for small shipment handling is direct daily dispatch between the origin terminal and destination terminal. Because the optimum is never achieved on all freight, freight must often be consolidated at intermediate or break-bulk terminals for over-the-road movement and distribution. Each consolidation typically requires cross-dock handling. Economics dictate that all of the terminal-to-terminal movements be made in equipment loaded as fully as possible, while the requirements of timely service dictate that shipments be dispatched as promptly as possible (A. 318, 337-338).

In many cases twin trailers eliminate movement of shipments through intermediate terminals. From Consolidated's analyses the threshold factor for direct daily trailer loadings between origin and destination terminals is reduced from the 30,000 pounds per day required with use of semi-trailers, to 15,000 pounds per day with use of twin trailers (A. 337-338). A dispatcher in Minneapolis with 18,000 pounds of freight for Fargo and 18,000 pounds of freight for Seattle may dispatch a twin trailer combination, drop one trailer off in Fargo for local delivery, attach another westbound trailer there and continue on to Seattle. With conventional semi-trailers the dispatcher would have to choose among (1) sending both shipments

³⁴In some cases semi-trailers are used for pickup and delivery instead of straight trucks. Substitution of twin trailers for semis permits more rapid and frequent service because each individual twin trailer unit can be dropped off and loaded or unloaded separately without delaying the entire vehicle combination (A. 370-371).

on a semi-trailer, accepting the necessity for unloading the Fargo shipment and reloading the semi; (2) sending two partially laden semi-trailers, accepting the increased cost of shipment; or (3) waiting until he had accumulated sufficient freight to ship a fully laden semi-trailer to each destination, accepting the increased delay.

An actual example illustrates the advantages of twin trailers. On September 16, 1975, the Badger Meter Company asked Consolidated to pick up and ship 9,125 pounds of water meters from Milwaukee to Nogales, Arizona. The Milwaukee dispatcher chose to use a twin trailer for this shipment because Milwaukee's close proximity to the Illinois border (41 miles) and the advantages of twin trailers on the remainder of the journey made use of the shuttle operation and staging area in Zion, Illinois the best alternative.³⁵ Consolidated dispatched a single twin trailer unit to Badger where the water meters were loaded. The driver of the single unit then picked up eight small shipments from other Milwaukee area businesses. These eight shipments were unloaded at the Milwaukee terminal and freight bound for Tucson, Arizona placed with the water meters. Simultaneously the Milwaukee terminal loaded another twin trailer with assorted shipments destined for Los Angeles. Because of Wisconsin's ban, tractors were attached to each twin trailer unit and they were individually hauled to Consolidated's staging area across the Wisconsin state line. There the extra tractor was removed and the two units then hauled in combination to Phoenix, Arizona. In Phoenix, the Los Angeles bound twin trailer

³⁵The dispatcher could have chosen to use a semi-trailer for the shipment. Dispatchers in Minneapolis and Detroit, for instance, typically are forced to use semi-trailer equipment for shipments between those points because of the lengthy shuttle or diversion that would be necessary if twin trailers were used (A. 311-313).

was matched with a twin trailer from Kansas City and the two dispatched to Los Angeles. The twin trailer containing the water meters was combined with another trailer from Long Beach, California, and the two dispatched to Tucson. In Tucson, the freight bound for Tucson was unloaded from the trailer, and the trailer with the water meters was interchanged with another carrier who served Nogales. The water meters arrived without ever having been removed from the original twin trailer. Had the Milwaukee shipments not been made in twin trailers, neither would have been dispatched on September 16 and both would have required a minimum of two additional in transit cross-dock handlings (A. 345-349).

Twin trailers offer other advantages outside of reduction of cross-dock handling and increased flexibility in scheduling. The freight shipped by general commodity carriers is bulky and of low density, and becoming more so because of lighter packaging materials (A. 89-90, 323). Carriers fill the available volume of their vehicles long before they approach the weight limits imposed by the states (A. 323). Because of their added volume, twin-trailer combinations can carry approximately thirty-four percent more cargo than a conventional semi-trailer (A. 373). Thus, fewer vehicles are needed to transport the same amount of cargo, resulting in equipment savings, lessened highway congestion (A. 125, 183-184, 374), and signifi-

cant fuel savings.³⁶ Moreover, because of easier access, two twin trailers with their increased cargo capacity can be unloaded in the same time as one full sized semi-trailer (A. 128-129, 334).

Wisconsin's refusal to permit twin trailers burdens the interstate motor transportation system directly. Carriers such as Consolidated must route their traffic around Wisconsin, maintain staging areas where twin trailer units may be divided for transport through Wisconsin, and use semi-trailer equipment for routes only partially in Wisconsin. These direct burdens are reflected in delays in transit and higher operating costs.³⁷ But because general commodity carriage is a system, indirect costs are perhaps far larger.

³⁶The Federal Energy Administration has concluded that twin trailers offer fuel savings of 20% over semi-trailers for the low density loads transported by common carriers of general commodities (A. 279-286). In regard to Wisconsin's ban, the FEA stated:

[FEA's] analysis shows significant potential for energy conservation through the utilization of twin-trailers. Motor carriers of general commodity freight will be able to travel across Wisconsin by direct and efficient routings and integrate and utilize uniform equipment in their operations East and West of Wisconsin. Further, the ability to use twin-trailers on the interstate routes going through Wisconsin will allow the motor carriers of interstate and intrastate commerce to utilize their most energy efficient equipment, reduce their costs, and eliminate unnecessary unloadings and reloadings at the Wisconsin border. In addition, containerized freight which is particularly adaptable to the utilization of twin-trailer services will be attracted to energy efficient barge transportation through the Port of Milwaukee (A. 285-286).

³⁷The record shows Consolidated's operating costs were increased by \$2,050,081 in 1974 by the direct burdens imposed by the Wisconsin ban. No attempt was made to estimate the indirect costs. Appellant Raymond, whose sole contact with Wisconsin is the through shipment of freight over I-90 and I-94, had added costs for labor and fuel alone of \$165,109 in 1974 (A. 375, Appendix "F" to Deposition of Arnold Foslien).

The most important of these is equipment incompatibility. Twin trailers use single drive axle tractors; semi-trailers use tandem axle tractors. Whereas carriers normally shift equipment between routes as fluctuations in traffic occur, semi-trailer equipment used on the routes through Wisconsin is incompatible with the equipment used on adjoining routes and cannot be shifted (A. 344-345, 378). In terms of absolute magnitude the problem is greatest for Appellant Consolidated. Scheduling and coordination problems which are already complex because of Consolidated's size become more so by the use of incompatible equipment in the same region. In terms of impact on the carrier, however, the problem is probably greater for Appellant Raymond because of Raymond's small size and the geography of its routes. The equipment which it uses in Minnesota and Illinois is incompatible with the equipment it must use to transport goods between Illinois and Minnesota (A. 371-372, 378-379). The difficulties are obvious.

The possibility of interchanging equipment between carriers is eliminated when incompatible equipment must be used. When Consolidated shipped the water meters to Nogales, Arizona, it transferred the twin trailer to another carrier with suitable equipment who then made the final delivery. Had the equipment of the carriers been incompatible, that interchange would be impossible. In 1974 35.7% of Consolidated's shipments were interlined or interchanged with other carriers (A. 322). Raymond routinely uses local cartage operators who operate twin trailer equipment to make final delivery of its freight from twin trailers in areas such as Little Falls, Minnesota (A. 370).

None of these burdens, direct or indirect, fall exclusively or even principally on Wisconsin shippers. Because rates are set by the Interstate Commerce Commission on a regional basis, increased costs are shared by shippers in many states (A. 351-359). All shippers whose most direct routing is through Wisconsin suffer delays because of Wisconsin's ban, and all of the shippers in the region are affected by the carriers' inability to shift incompatible equipment between routes.

D. WISCONSIN'S PROHIBITION DOES NOT PROMOTE SAFETY.

The balancing test of *Pike* requires that such heavy burdens on interstate commerce be justified by strong legitimate local interests for the state regulation to be constitutional. In a Pretrial Conference Order the District Court directed the Defendants to file an amended answer setting forth "... every justification for the challenged regulation, such as safety, for example, upon which defendants will rely..." (A. 25). Defendants did so, and advanced safety as the sole local interest to be served, conceding that twin trailers did not cause increased road wear or damage (A. 18, 24, 25-29).

The evidence compiled on safety was voluminous and comprehensive. Expert testimony was introduced on every aspect of safety. The test results and expert opinion on such matters as braking distance and characteristics (A. 36, 61, 67, 96-97, 123-125), tendency to jackknife (A. 102, 121-124, 142-143, 147), maneuverability (A. 36, 47-48, 80-81, 141), splash and spray characteristics (A. 72-73, 84-85, 109-120, 134-137), stability (A. 36, 49), and tracking characteristics (A. 59-60, 65, 92, 120-121, 141, 162) were adduced. The tests had been conducted for on-

going studies by the government or other institutions; none were undertaken for this case. In each category, there was expert testimony that twin trailers were as safe or safer than semi-trailers. In many areas of comparison, such as maneuverability, stability, and splash and spray characteristics, twin trailers proved superior to semi-trailers. In no category were they rated worse.³⁶ Every expert who had an opinion came to the overall conclusion that twin trailers were as safe or safer than semi-trailers (A. 34, 52-53, 62, 64-65, 70-71, 75-76, 82-84, 99, 141).

The expert opinions and test results were supported by actual experience with twin trailers. Affidavits or testimony were introduced from highway officials in many of the states located along the I-94 route: Michigan, Minnesota, South Dakota, North Dakota, Montana, Wyoming, Idaho, Oregon and Washington (A. 63-73, 154-167). Additional affidavits were obtained from other states with severe weather and terrain problems, such as Colorado (A. 167). All of these states have actual experience with twin trailer operations. Representative comments include:

Dennis Eisnach, Superintendent, South Dakota Highway Patrol:

³⁶In order to evaluate performance characteristics, Appellants and Defendants alike have compared twin trailer combinations to the 55-foot semi-trailers presently utilized in Wisconsin. This comparison is not done to denigrate the impressive safety record of semi-trailers, for as California Highway Patrol Commissioner A.S. Cooper testified:

"Both are extremely safe vehicles and consistently among the vehicle types with the lowest accident rates. The accident rates for both doubles and semis are much lower than other trucks and the auto." (A. 62)

Nevertheless, the semi does provide a recognizable standard by which other vehicles can be compared (A. 114). The semi also represents a degree of operational safety clearly accepted in Wisconsin.

"2. The accident experience with 65-foot double bottom trucks on South Dakota highways indicates that these units have not caused any safety hazard.

3. A summary review of our accident record shows no difference in the over-all accident experience with 65-foot doubles as compared with 55-foot tractor semi trailer units.

4. The South Dakota Highway Patrol has not received any motorist complaints related to the twin trailer configuration of these trucks." (A. 156-157).

Robert Hamilton, Permit Director, Oregon State Highway Department:

"2. Sixty-five foot double bottom trucks have been permitted on Oregon highways since 1951. They are currently allowed to traverse 97% of the State highway system, which includes two lane, as well as four lane highways. Sixty-five foot doubles are allowed on all Interstate roadways in Oregon.

3. The use of double bottom trucks has caused no safety problem in Oregon.

4. During his (Hamilton's) five years as Permit Director, no citizen complaints whatsoever concerning double bottom trucks have been brought to his attention or filed with this office.

5. The double bottom truck is an integral part of truck transportation in Oregon." (A. 164-166).

The testimony of two officials was particularly compelling, because in both instances they initially opposed the use of twin trailers. Ernest Cox, Former Deputy Director of the Bureau of Motor Carrier Safety, United States Department of Transportation, testified that he had opposed amending Department regulations to permit carriage of explosives in twin trailers because he was skeptical of twin trailer stability. After a study of accident reports and accident experience and field observations of twin trailers by D.O.T. staff, he changed his initial opinion, and recommended that twin trailers having a

wheel base of at least 184 inches be permitted to carry explosives (A. 46-49).³⁹ Similarly, Claud McCammet, former Safety Director of the Kansas State Highway Commission was opposed to twin trailers until his office conducted extensive studies of them. His eventual conclusion was that twin trailers were safer than conventional semitrailers (A. 78-83).

These observations were reinforced by the two major statistical studies conducted of twin trailer safety. The Bureau of Motor Carrier Safety, United States Department of Transportation, conducted a survey covering a five-year period:

"The data shows that the twin trailers are safer than conventional semitrailers after computing the number of accidents per 100,000 (miles), the number of injuries per 100,000 miles and the number of fatalities per 100,000 miles, and estimates of the property damage, injuries and fatalities on a per-accident basis.

In all the years covered by this data, the twin-trailer operations are significantly safer." (A. 35)

Similarly, a California State Highway Patrol study of 31,883 accidents in California in 1972 found:

"Doubles and semis both had an accident rate of .5.

Table 2 shows that only the commercial bus accident rate, .4 fatal and injury accidents per million miles of travel, was lower than the .5 rate established by tractor-semitrailers and doubles.

Other trucks and all other motor vehicles trailed at .7. Thus, in terms of accident rates, doubles appear to be one of the safest

³⁹The 184 inch wheelbase trailers referred to are the 27 foot twin trailers at issue in this case (A. 51).

vehicles on the road. They are at least as safe as the tractor-semitrailer in this respect." (A. 57)

The California Highway Patrol compared its accident data with that of two twin trailer users, including Consolidated, for control purposes and concluded:

"(T)he conclusions drawn regarding the accident frequency of doubles and tractor-semitrailer appear to have been confirmed. Although the magnitudes differed, the ordering remained constant from source to source. In each case, the statistics indicate that the doubles are as safe as tractor-semitrailer. In fact, they indicate a lower accident rate among doubles than among tractor-semitrailer." (A. 57-58)

Despite the claim that the state prohibited twin trailers because of safety, the state could offer no evidence that twin trailers were unsafe. Defendant Robert T. Huber, Chairman of the Wisconsin Highway Commission testified that the Commission had not denied plaintiffs' request for permits on the basis of safety:

Q. Well, is it a fair statement of your testimony that in denying the plaintiffs' permit the Highway Commission took into account factors other than merely those which the Highway Commission might deem necessary for the safety of travel and the protection of the highways?

A. I think I answered that before by saying that legislative direction is one of the major factors in our decision.

Q. The Highway Commission itself would not have determined that granting of the permits posed any danger whatsoever to the safety of travel?

A. I'm not prepared to make a statement relative to the safety of these vehicles. I don't think I would comment on it at this time." (A. 250-251)

James Karns, former Motor Vehicle Commissioner for the State of Wisconsin testified that as Motor Vehicle

Commissioner he had conducted a survey of twin trailer safety experience in other states and had concluded that there was no reason not to permit twin trailer operation in Wisconsin (A. 74-76).

The sole witness who raised any question as to the safety of twin trailers was Dr. L. S. Robertson. Dr. Robertson testified that his studies showed a higher rate of fatalities for passenger car occupants in collisions between trucks and passenger cars than accidents between passenger cars. His studies, however, did not differentiate between types of trucks, the relative frequency of accidents based on miles driven, or the type of highways used. He stated that he had no opinion as to the relative safety of twin trailers and semi-trailers (A. 154).

The evidence on safety demonstrates conclusively that Wisconsin's refusal to permit twin trailers on Interstate Highways does not promote safety, the sole legitimate local interest advanced.

E. THE LOWER COURT ERRED BY FAILING TO APPLY THE APPROPRIATE STANDARD.

1. The Lower Court Did Not Balance the Facts But Instead Relied Upon Presumptions from Cases Decided Under Abandoned Standards.

The District Court in determining whether or not Wisconsin's ban on twin trailers violated the commerce clause posited the *Pike* standard as the appropriate test. But it did not regard *Pike* as overruling a series of motor vehicle cases determined by this Court in the 1920's and 1930's under the now abandoned subject matter test of *Cooley v. Board of Wardens, supra*. Rather it relied upon

the findings and presumptions contained in the old motor vehicle cases to construct a syllogism.

The District Court's major premise was that non-discriminatory state motor vehicle regulations in the interest of safety were valid:

"This Court begins by recognizing that, absent national legislation precluding differing state policies concerning a particular aspect of interstate commerce, a state 'may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' *Sproles v. Binford*, 286 U.S. 374, 390 (1932), quoting *Morris v. DUBY*, 274 U.S. 135, 143 (1927)." (Jurisdictional Statement, p. 11a)

The minor premise was that Wisconsin's refusal to permit twin trailers on Interstate Highways was a regulation in the interest of safety. The record could not support the premise adequately; the sole safety hazard that the District

Court cited was that of additional delay in passing.⁴⁰ But the evidence in this case was largely immaterial to the District Court, for the same motor vehicle cases of the 1920's and 1930's provided a second presumption which the District Court felt bound by:

⁴⁰All of the expert testimony showed that there was no additional hazard to passing a twin trailer combination on Interstate Highways:

Fred J. Myers (Retired Chief Engineer, Western Highway Institute) concluded:

"I don't think it is of any importance on a multiple lane highway when the vehicles are traveling in the same direction." (A. 94)

Col. Crawford (Minnesota State Patrol) stated:

"You're really only talking about ten feet, you know, difference, and the passing time for that ten feet is not that significant." (A. 69)

Commissioner Cooper (California Highway Patrol) stated:

"Although passing time has not been measured by the California Highway Patrol, a study by the U.S. Department of Commerce [H.R. Doc. No. 354, 88th Cong., 2nd Sess. 93 (1964)] indicated that vehicles up to 75 feet would not have a significant effect upon the safety potential of the usual passing operations on a two-lane facility. As such, the time required to pass a 65-foot double would not create a more significant hazard than the time required to pass other trucks and buses." (A. 61)

Mr. Marshall (Minnesota Department of Highways) stated:

"We are talking ten foot longer length trailer, or total combination, and in passing we are talking probably a second or so, and I don't think — we haven't heard any complaints from the people on anything in this respect." (A. 72)

Mr. Sherard (Chief Engineer, Western Highway Institute) testified:

"Q. Do you have an opinion as to whether the additional 10 feet in length of a twin over the length of a semi, both operating on a four-lane divided interstate highway, constitutes a safety hazard?

A. I don't think it does.

Q. That is your opinion?

A. That is my opinion, that it doesn't. We are talking about an interstate highway?

Q. Right.

A. Four-lane divided highway?

Q. Correct . . ." (A. 128)

Moreover, the District Court's apprehension of an increased hazard to passing under adverse weather conditions was also contradicted by the record. The record shows that the splash and spray characteristics of twin trailers are unquestionably superior to that of semi-trailers. (A. 109-118, 134-137, 72-73, 84-85)

"The United States Supreme Court has on several occasions equated limitation on vehicle size to public safety. The opinions in these cases contain language which is quite broad; they demonstrate that for purposes of judicial review of state highway legislation, size restrictions might be deemed inherently tied to public safety . . ." citing *Morris v. Doby*, 274 U.S. 135 (1927); *Buck v. Kuykendall*, 267 U.S. 307 (1925); *Sproles v. Binford*, 286 U.S. 374 (1932), *Simpson v. Shepard* (The Minnesota Rate Cases) 230 U.S. 352 (1912) (Jurisdictional Statement, 15a)

If state regulation of motor vehicles in the interest of safety were valid, and regulations of size were inherently regulations for safety, the conclusion was inescapable: Wisconsin's prohibition of twin trailers was valid. The Court felt little need to consider the burden imposed on commerce:

"The burdens thereby imposed upon interstate commerce are not unconstitutional in scope or degree." (Jurisdictional Statement, p. 15a)

In relying upon the presumptions rather than examining the facts of the particular case, the District Court neglected the historical lesson that led to *Pike*. It was the failure of the fixed standards that led to acceptance of the balancing test. To now append to that balancing test, as part of the weighing process, presumptions from cases decided under an abandoned fixed standard is to combine the disadvantages of the balancing test with the disadvantages of the fixed standards. That is not the lesson of this Court:

"Adjudication entails 'emphasis upon the concrete elements of the situation that concerns both state and national interests. The particularities of a local statute touch its special aims and the scope of their fulfillment, the difficulties which it seeks to adjust, the price at which it does so . . . (P)ractical considerations, however screened by doctrine, underlie the resolution of conflicts between state and national power.' F. Frankfurter,

The Commerce Clause Under Marshall, Taney and Waite 33-34 (1937).

(I)t seems clear that those interferences (with interstate commerce) not deemed forbidden are to be sustained . . . because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines. *Di Santo v. Pennsylvania*, 273 U.S. 34, 44, 71 L. Ed 524, 47 S. Ct 267 (1927) (Stone, J., dissenting)." *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 372, f.n. 6 (1976)

The District Court similarly erred in finding the regulatory scheme to be nondiscriminatory. It recognized that the proper test to be applied was that of the practical effect of the regulation (Jurisdictional Statement, p. 8a). However, the test it apparently applied was that of whether the regulation was facially neutral and intended to gain local economic advantage:

"The record in this action does not reveal that by means of these facially neutral proscriptions the state of Wisconsin intentionally seeks to isolate local industry or agriculture from foreign competition." (Jurisdictional Statement, p. 10a)

More importantly, the Court's decision on discrimination was tainted by its acceptance of the erroneous presumption that vehicle size was inherently tied to safety. The Court believed that the presumption provided a rational basis that justified the discrimination whether challenged on Fourteenth Amendment grounds or commerce clause grounds (Jurisdictional Statement, p. 20a).

2. The Lower Court Erroneously Failed to Consider Whether Less Burdensome Alternatives Were Available to Wisconsin.

South Carolina Highway Department v. Barnwell Bros., 303 U.S. 177 (1938) led the District Court to one final error. Because *Barnwell* held motor vehicle regulation to be a subject area regulated by the state, the District Court regarded it as inappropriate for a federal court to consider less burdensome alternatives (Jurisdictional Statement, p. 12a, f.n. 10).

Such an approach, stemming from the subject matter test, is contrary to the approach required by *Pike*:

"If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

"Inquiry whether adequate and less burdensome alternatives exist is, of course, important in discharge of the Court's task of 'accommodation' of conflicting local and national interests, since any 'realistic' judgment" whether a given state action 'unreasonably' trespasses upon national interests must, of course, consider the 'consequences to the State if its action were disallowed.' Dowling, *Interstate Commerce and State Power*, 27 Va L Rev 1, 22 (1940)." *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 373 (1976)

The District Court, as an aside, suggested that no less intrusive alternative than a general length limitation appeared possible (Jurisdictional Statement, p. 12a, f.n. 10). Such a less intrusive alternative is available however. Wisconsin already exempts certain uses by permit from its general limitation. Appellants do not seek a holding that the general limitation of vehicle length is invalid. They

seek to invalidate that part of the permit system which prevents their permit applications from being considered on an equal basis with other applications. Were it not for WIS. ADMIN. CODE §Hy 30.14(3)(a), Appellants could obtain permits allowing them to use twin trailers (A. 248). Those permits would designate the highways to be used and would be subject to the appropriate safety regulations contained in WIS. ADMIN. CODE §Hy 30.01.

A permit confined to the Interstate Highways and connecting roads, issued under the existing permit system, would retain the state's ability to regulate and control motor vehicles on local roads while removing from interstate commerce the principal burden upon it. Such an alternative is an appropriate alternative to the present flat prohibition of twin trailers from all highways in Wisconsin.

3. The District Court Was Misled by This Court's Decision in *Bibb v. Navajo Freight Lines, Inc.*

Though the District Court erred in applying the factual and legal presumptions of *Barnwell* and other cases of its period in its consideration under *Pike*, that error is in part attributable to this Court. In 1959 this Court held unconstitutional a state regulation of motor vehicles which unduly burdened interstate commerce, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). In doing so, however, this Court specifically denied that it was overruling *Barnwell*. The facts in *Bibb*, it suggested, were peculiar, and the result was to be considered as an aberration and not as the establishment of a new rule:

"This is one of those cases — few in number — where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce." 359 U.S. at 529.

We respectfully submit to the Court that *Bibb*⁴¹ was not an aberration. Its facts were and are typical, reflecting fundamental changes in the motor transportation industry since *Barnwell* was decided.

In 1938, when South Carolina limited the size of vehicles on its roads, the regulation was principally one of local commerce. Interstate motor transportation was in its infancy. In 1959, when *Bibb* was decided, interstate transportation had increased dramatically.⁴¹ A state regulation requiring a specific type of mudguard in Illinois, rather than being a regulation of local commerce with only minor effects on interstate commerce, affected numerous interstate carriers. This minor regulation had major effects throughout the motor transportation system causing delays and interfering with interchanging of equipment.

The character of the highways, an integral part of the motor transportation system, was also changing. Roads in 1938 were principally the creation of the state, largely financed by state money and constructed to varying state standards. They served principally as routes for local commerce.

Many roads are now major channels of interstate commerce. The Interstate Highway System, begun before

⁴¹On a ton-mile basis, motor carriage has increased from 40,000 million ton-miles in 1938 to 288,519 million ton-miles in 1959 and to 495,000 million ton-miles in 1974. *Fifty-Third, Seventy-Fourth, and Eighty-Ninth Annual Report to Congress of the Interstate Commerce Commission* (Government Printing Office, 1939, 1950, 1975).

In 1972, out of 19 broad commodity groupings, trucks were the predominant transportation means (over 50%) for 16 commodity groupings. Excluding private trucks, for hire motor carriers were predominant in 9 commodity groups, 1972 *Census of Transportation*, U.S. Bureau of the Census.

Bibb, is designed to provide a national and regional highway system. The Interstate System is principally funded by federal money, with routes subject to federal approval, and is constructed to uniform standards promulgated by the Secretary of Transportation.⁴²

Barnwell's statement that regulation of the use of highways was "peculiarly a local concern" was doubtful in 1959 and no longer true today as applied to all highways. Interstate Highways are not less suitable for varying local regulation because of federal financing and involvement, but are less suitable because they are an integral part of an interstate transportation system. One state's regulation of the use of that system in its jurisdiction automatically affects the use of the system in neighboring states. If *Bibb* failed to recognize the beginning of a fundamental change in 1959, the District Court in this case, by relying on *Bibb*'s refusal to overrule *Barnwell*, failed to recognize a fundamental change which is now largely completed and manifest.

Bibb also misled the District Court in respect to discrimination. In *Bibb* the Supreme Court determined that the Illinois regulation was nondiscriminatory. In so doing this Court considered not the effect of the regulation, but its form. The Illinois regulation on its face applied alike to local and interstate commerce. The effect on local commerce, however, was minor, merely requiring permanent substitution of one type of mudguard for another, whereas the effect on interstate commerce

⁴²23 U.S.C. §§101-109.

Interstate routes are selected so as to connect as directly as practicable, "the principal metropolitan areas, cities, and industrial centers . . . and to connect . . . with routes of continental importance in the Dominion of Canada and the Republic of Mexico" 23 U.S.C. §103(e)(1).

was major. Rather than requiring a single change of equipment, mudguard types would have to be substituted each time the interstate carrier crossed the border. The inequality in burden, and thus in the practical effect of the regulation, should have been determined to be discriminatory under the commerce clause.

Such an interpretation of commerce clause discrimination is not novel:

"... a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all states, including the people of the State enacting such statute." *Minnesota v. Barber*, 136 U.S. 313, 326 (1890).

In *Barnwell* the Court believed that undue burdens on interstate commerce could be prohibited by the political mechanism so long as the statute was non-discriminatory:

"The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce ... is a safeguard against their abuse." 303 U.S. at 187.

For such a theory to work, however, the burdens imposed by the regulation on local and interstate commerce must be equal. The test for discrimination must focus on the effects of the regulation on interstate and local commerce, not on whether it is facially neutral. If the effects of regulation on interstate and local commerce are not similar, then there will be no domestic political pressure to relieve unreasonable burdens on commerce.

Such is the case here. Wisconsin's prohibition of twin trailers burdens principally interstate general commodity carriers for whom twin trailers are the industry standard. Local motor carriage does not suffer a substantial burden and thus has no reason to seek legislative change. Nor are shippers in Wisconsin who use interstate general commodity carriers significantly burdened by the ban. Shipping rates are set by the Interstate Commerce Commission on a regional basis, spreading the cost burden over many states.

VIII. CONCLUSION

The facts of this case are not substantially in controversy. The principal question is the legal standard that should be applied to those facts. *Pike v. Bruce Church*, *supra*, established a general standard applicable to all commerce clause cases. Under that standard Wisconsin's prohibition of twin trailers is unconstitutional, for it imposes a heavy burden on interstate commerce, serves no legitimate local interest, and discriminates by placing differing burdens on interstate commerce and local commerce.

The standard applied by the District Court, that of *South Carolina Highway Dep't. v. Barnwell*, *supra*, declared that regulation of motor vehicles was a matter reserved to the states free from the restraints imposed by the commerce clause other than the prohibition on discrimination. *Barnwell* so concluded on the basis of the locality test in *Cooley v. Board of Wardens*, *supra*. The policy reasons of *Cooley* can, however, no longer be advanced as support for *Barnwell*. The changing nature of motor transportation in this country has removed motor

transportation from those subjects solely suited for local regulation.

Wisconsin's prohibition of twin trailers is not a matter involving only the accommodation of local interests. The national interest is directly involved in Wisconsin's ban. It is a national transportation system which is disrupted, a national energy supply which is imprudently consumed, and a national highway system which is regulated. The effects of Wisconsin's prohibition are not confined to Wisconsin. Delays in service, decreased availability of service, and increased costs are caused in other states.

To apply *Barnwell* to such circumstances is to engage in circular reasoning: the burden on interstate commerce need not be considered, because the subject matter is local in character and it is local in character because there is no national interest involved. It is a species of reasoning which forecloses judicial application of the commerce clause, even though the policy factors for that application are present.

This Court has repeatedly recognized that the commerce clause, by itself, without legislative action protects interstate commerce from burdensome regulation by the state. If it did not, Congressional action would be the sole available protection. That legislative protection, however, frequently achieves too little or too much:

"There is no assurance that the commerce problem would be as well handled by Congress alone, as where both congress and courts participate in its solution . . . Congress is a big and heavy machine to set in motion and its progress is sometimes impeded even when national interests of the highest order are at stake.

. . .

Even if Congress should accept the task it would not find it an easy one. It would have to labor with much of the same evidence . . . and perhaps more often than not the solution would have to be stated in general terms." Dowling, *Interstate Commerce and State Power — Revised Version*, 27 Va.L. Rev. 1, 23 (1940).

If Congress does not act, significant restrictions on national commerce go unchecked. If it does act, the necessity of applying general rules to all the states risks the failure to properly recognize significant local interests. All too often the replacement of local regulation by federal legislation engenders as many problems as it solves.

The balancing test of *Pike* permits a more individual accommodation of the policy interests involved. *Pike*, applied on a case by case basis, permits a precise balancing of state and federal claims which can never be achieved by application of a general rule.

"[I]n areas where activities of legitimate local concern overlap with the national interest expressed by the Commerce Clause — where local and national powers are concurrent — the Court in absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' *H.P. Hood & Sons, Inc. v. DuMond*, supra, at 553, 93 L.Ed. 865, 69 S.Ct. 657 (Black, J., dissenting), thereby attempting 'the necessary accommodation between local needs and the over-riding requirement of freedom for the national commerce,' *Freeman v. Hewit*, supra, at 253, 91 L. Ed. 265, 67 S.Ct. 274." *Great Atlantic and Pacific Tea Company v. Cottrell*, supra, at 371

Pike permits consideration of the national interest; it does not require that the motor vehicle regulations by the fifty states be replaced by a continuing judicial supervision. The presumption of validity which attaches to any statute ensures restraint on the part of the courts. Only in those few situations where the state regulation burdens

commerce heavily and serves safety or other legitimate local interests only minimally, does *Pike* require the courts to hold the state regulation invalid.

When the facts of this case are weighed under the *Pike* standard it is clear that Wisconsin's regulation violates the commerce clause. The facts of this case are strikingly similar to those in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). In that case this Court invalidated an Arizona statute limiting the length of trains. The state regulation forced the railroads to operate yards at the Arizona borders where train size was reduced, or to run shorter trains in other states. The alleged safety interest was shown to be slight or non-existent because the increased number of trains necessary compensated for any improvement in the safety of one train.

"We think, as the trial court found, that the Arizona Train Limit Law, viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations and the consequent increase in train accidents of a character generally more severe than those due to slack action. Its undoubted effect on the commerce is the regulation, without securing uniformity, of the length of trains operated in interstate commerce, which lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency. In these respects the case differs from those where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 779 (1945).

Though *Southern Pacific* contrasted train regulation with motor vehicle regulation, repeating the holding of *Barnwell* that regulation of motor vehicles was a local concern, the presence in this case of the same interests and

burdens as in *Southern Pacific* suggests that the same balancing test should be applied.

The case differs from *Southern Pacific* in two respects. In *Southern Pacific* it was necessary to invalidate all state regulation of train length. Here, because of the Wisconsin permit system, a reasonable alternative exists which still allows the state to regulate the use of its highways generally, while accommodating the national interest by permitting twin trailer operations on designated Interstate Highways and connecting roads only. Such an accommodation of the national interest and local interest is the type of "delicate adjustment" which may be made under *Pike*.

In *Southern Pacific* there was no discrimination between interstate and local commerce. The Wisconsin regulatory scheme does discriminate. That discrimination is a violation of the Fourteenth Amendment and of the commerce clause which, under all standards, has been held to independently forbid discrimination.

Failure to recognize the national interests involved or the pernicious effects of discrimination by the states is to invite fragmentation of our economic union.

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competi-

tion from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949).

Respectfully Submitted,

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APPENDIX

TEXT OF STATUTES

348.05 Width of vehicles. (1) No person without a permit therefor, shall operate on a highway any vehicle having a total width in excess of 8 feet, except as otherwise provided in this section.

(2) The following vehicles may be operated without a permit for excessive width if the total outside width does not exceed the indicated limitations:

* * *

(k) 9 feet for loads of tie logs, tie slabs and veneer logs, provided that no part of the load shall extend more than 6 inches beyond the fender line on the left side of the vehicle or extend more than 10 inches beyond the fender line on the right side of the vehicle. The term "fender line" as used herein means as defined in s. 348.09. This paragraph shall not be applicable to transport on highways designated as parts of the national system of interstate and defense highways pursuant to s. 84.29. The exemptions provided by this paragraph shall apply only to single and tandem axle trucks.

(l) Ten feet for loads of hay in bales from the point of production to drying or milling plants or farms if the size of the bales is not more than 5 feet in length and not more than 6 feet in diameter. This paragraph shall not be applicable to transport on highways designated as parts of the national system of interstate and defense highways under s. 84.29.

* * *

2a

348.06 Height of vehicles. (1) No person, without a permit therefor, shall operate on a highway any motor vehicle, mobile home, trailer or semitrailer having an over-all height in excess of 13½ feet, except as otherwise provided in sub. (2).

(2) The following vehicles may be operated without a permit for excessive height if the over-all height does not exceed the indicated limitations:

(a) No limitation for implements of husbandry temporarily operated upon a highway;

* * *

348.07 Length of vehicles. (1) No person, without a permit therefor, shall operate on a highway any single vehicle with an over-all length in excess of 35 feet or any combination of 2 vehicles with an over-all length in excess of 55 feet, except as otherwise provided in subs. (2) and (2a).

(2) The following vehicles may be operated without a permit for excessive length if the over-all length does not exceed the indicated limitations:

* * *

(d) 60 feet for a combination of mobile home and towing vehicle, except that no mobile home and towing vehicle having a combined length in excess of 50 feet shall be operated during the hours of 12 m. to 12 p.m. on Sundays, New Year's, Memorial, Independence, Labor, Thanksgiving and Christmas days;

3a

(e) No limitation for implements of husbandry temporarily operated upon a highway;

* * *

(2a) Tour trains consisting of 4 vehicles including the propelling motor vehicle may be operated as provided in s. 348.08 (1) (c).

348.08 Vehicle trains. (1) No person, without a permit therefor shall operate on a highway any motor vehicle drawing or having attached thereto more than one vehicle. . . .

* * *

348.15 Weight limitations on class "A" highways. (1) In this section:

* * *

(3) For enforcement purposes only and in recognition of the possibility of increased weight on a particular wheel or axle or group of axles due to practical operating problems, including but not limited to accumulation of snow, ice, mud or dirt, the use of tire chains or minor shifting of load, no summons or complaint shall be issued, served or enforced under sub. (2) unless:

* * *

(d) The gross weight imposed on the highway by all axles of a vehicle or combination of vehicles exceeds 73,000 pounds.

348.175 Seasonal operation of vehicles hauling peeled or unpeeled forest products cut crosswise. The transportation of peeled or unpeeled forest products cut crosswise in excess of gross weight limitations under s. 348.15 shall be permitted during the winter months when the highways are so frozen that no damage may result thereto by reason of such transportation. If at any time any person is so transporting such products upon a class "A" highway in such frozen condition then he may likewise use a class "B" highway without other limitation, except that chains and other traction devices are prohibited on class "A" highways but such chains and devices may be used in cases of necessity

348.19 (1) . . . (b) Any other provision of the statutes notwithstanding, a vehicle transporting peeled or unpeeled forest products cut crosswise shall not be required to proceed to a scale more than one mile from the point of apprehension if the estimated gross weight of the vehicle does not exceed the lawful limit.

* * *

348.25 General provisions relating to permits for vehicles and loads of excessive size and weight. (1) No person shall operate a vehicle on or transport an article over a highway without first obtaining a permit therefor as provided in s. 348.26 or 348.27 if such vehicle or article exceeds the maximum limitations on size, weight or projection of load imposed by this chapter.

(2) Vehicles or articles transported under permit are exempt from the restrictions and limitations imposed by this chapter on size, weight and load to the extent stated in the permit. Any person who violates a condition of a per-

mit under which he is operating is subject to the same penalties as would be applicable if he were operating without a permit.

(3) The highway commission shall prescribe forms for applications for all single trip permits the granting of which is authorized by s. 348.26 and for those annual or multiple trip permits the granting of which is authorized by s. 348.27 (2) and (4) to (7m). The commission may impose such reasonable conditions prerequisite to the granting of any permit authorized by s. 348.26 or 348.27 and adopt such reasonable rules for the operation of a permittee thereunder as it deems necessary for the safety of travel and protection of the highways. Local officials granting permits may impose such additional reasonable conditions as they deem necessary in view of local conditions.

(4) Except as provided under s. 348.27 (7m), permits shall be issued only for the transporting of a single article or vehicle which exceeds statutory size, weight or load limitations and which cannot reasonably be divided or reduced to comply with statutory size, weight or load limitations, except that:

(a) A permit may be issued for the transportation of property consisting of more than one article, some or all of which exceeds statutory size limitations, provided statutory gross weight limitations are not thereby exceeded and provided the additional articles transported do not cause the vehicle and load to exceed statutory size limitations in any way in which such limitations would not be exceeded by the single article.

(b) A single trip permit may be issued for the transportation of a load of implements of husbandry, consisting of not more than 2 articles, when the load does not exceed the length requirement in s. 348.07 by more than 5 feet.

348.26 Single trip permits. (1) APPLICATIONS. All applications for single trip permits for the movement of oversize or overweight vehicles or loads shall be made upon the form prescribed by the highway commission and shall be made to the officer or agency designated by this section as having authority to issue the particular permit desired for the use of the particular highway in question.

(2) PERMITS FOR OVERSIZE OR OVERWEIGHT VEHICLES OR LOADS. Except as provided in sub. (4), single trip permits for oversize or overweight vehicles or loads may be issued by the highway commission for use of the state trunk highways and by the officer in charge of maintenance of the highway to be used in the case of other highways. Such local officials also may issue such single trip permits for use of state trunk highways within the county or municipality which they represent. Every single trip permit shall designate the route to be used by the permittee. Whenever the officer or agency issuing such permits deems it necessary to have a traffic officer accompany the vehicle through his municipality or county, a reasonable charge for such traffic officer's services shall be paid by the permittee.

(3) TRAILER TRAIN PERMITS. The highway commission and those local officials who are authorized to issue permits pursuant to sub. (2) also are authorized to issue single trip permits for the operation of trains consisting of truck-tractors, tractors, trailers, semitrailers or wagons on highways under their jurisdiction, except that no trailer

train permit issued by a local official for use of a highway outside the corporate limits of a city or village is valid until approved by the highway commission. No permit shall be issued for any train exceeding 100 feet in total length. Every permit issued pursuant to this subsection shall designate the route to be used by the permittee.

(4) MOBILE HOME PERMITS. Single trip permits for the movement of oversize mobile homes may be issued only by the highway commission, regardless of the highways to be used. Every such permit shall designate the route to be used by the permittee and shall authorize use of the highways only between sunrise and sunset on days other than Saturdays, Sundays and holidays.

348.27 Annual of multiple trip permits. (1) APPLICATIONS. All applications for annual or multiple trip permits for the movement of oversize or overweight vehicles or loads shall be made to the officer or agency designated by this section as having authority to issue the particular permit desired for use of the particular highway in question. All applications under subs. (2) and (4) to (7m) shall be made upon forms prescribed by the highway commission.

(2) ANNUAL PERMITS. Annual permits for oversize or overweight vehicles or loads may be issued by the highway commission, regardless of the highways involved. A separate permit is required for each oversize or overweight vehicle to be operated upon a highway.

* * *

(4) INDUSTRIAL INTERPLANT PERMITS. The highway commission may issue, to industries and to their agent motor carriers owning and operating oversize vehicles in connec-

tion with interplant, and from plant to state line, operations in this state, annual permits for the operation of such vehicles over designated routes, provided that such permit shall not be issued under this section to agent motor carriers or from plant to state line for vehicles or loads of width exceeding 96 inches upon routes of the national system of interstate and defense highways. If the routes desired to be used by the applicant involve city or village streets or county or town highways, the application shall be accompanied by a written statement of route approval by the officer in charge of maintenance of the highway in question. A separate permit is required for each oversize vehicle to be operated.

(5) POLE, PIPE AND VEHICLE TRANSPORTATION PERMITS. Except as further provided in this subsection, the highway commission may issue an annual permit to pipeline companies or operators or public service corporations for transportation of poles, pipe, girders and similar materials and to companies and individuals hauling peeled or unpeeled pole-length forest products used in its business and to auto carriers operating "haulways" specially constructed to transport motor vehicles and which exceed the maximum limitations on length of vehicle and load imposed by this chapter. Such permits issued to auto carriers and to companies and individuals hauling peeled or unpeeled pole-length forest products shall limit the length of vehicle and load to a maximum of 10 feet in excess of the limitations in s. 348.07 (1) and shall be valid only on a class "A" highway as defined in s. 348.15 (1) (b). Permits issued to companies or individuals hauling pole-length forest products may not exempt such companies or individuals from the maximum limitations on vehicle load imposed by this chapter.

(6) TRAILER TRAIN PERMITS. Annual permits for the operation of trains consisting of truck tractors, tractors, trailers, semitrailers or wagons which do not exceed a total length of 100 feet may be issued by the highway commission for use of the state trunk highways and by the officer in charge of maintenance of the highway to be used in the case of other highways. No trailer train permit issued by the local officials for use of highways outside the corporate limits of a city or village is valid until approved by the highway commission. Every permit issued pursuant to this subsection shall designate the route to be used by the permittee.

(7) MOBILE HOME PERMITS. The highway commission may issue annual statewide permits to licensed mobile home transport companies and to licensed mobile home manufacturers and dealers authorizing them to transport oversize mobile homes over any of the highways of the state in the ordinary course of their business. Every such permit shall authorize use of the highways only between sunrise and sunset on days other than Saturdays, Sundays and holidays.

(7m) TRANSPORTATION OF METAL SCRAP. The highway commission may issue an annual permit for the transportation of a divisible overweight axle or tandem axle load from the point of origin to the point of unloading when the load consists of metal scrap. However, the overall load weight shall be restricted in accordance with s. 348.15 (3) (d), which limits the overall load to 73,000 pounds.

(8) EMERGENCY ENERGY CONSERVATION PERMITS. During an energy emergency, the highway commission may waive the divisible load limitation of s. 348.25 (4) and issue permits valid for a period not to exceed 30 days for overweight vehicles carrying energy resources or fuel or milk commodities designated by the governor or his designee, regardless of the highways involved, to conserve energy. Such permits may only allow weights not more than 10% greater than the gross axle and axle combination weight limitations, and not more than 15% greater than the gross vehicle weight limitations under ss. 348.15 and 348.16. No permit issued under this subsection is valid unless the overweight vehicle is registered under ch. 341 for the maximum gross weight allowed by the permit and the department of transportation has been paid a permit fee of \$10 per 1,000 pounds or fraction thereof for the amount by which such maximum gross weight exceeds 73,000 pounds. Nothing in this subsection shall be construed to permit the highway commission to waive the requirements of s. 348.07.

(9) POLE LENGTH AND PULPWOOD PERMIT. The highway commission may issue annual permits for the transportation on a vehicle combination consisting of a truck and full trailer of loads of pole length and pulpwood exceeding statutory length or weight limitations over any class of highway for a distance not to exceed 3 miles from the Michigan-Wisconsin state line, provided that if the roads desired to be used by the applicants involve streets or highways other than those within the state trunk highway system, the application shall be accompanied by a written

statement of route approval by the officer in charge of maintenance of such other highway.

TEXT OF ADMINISTRATIVE REGULATIONS

Hy 30.01 General. (1) Pursuant to authority contained in section 348.25 (3), Wis. Stats., the commission does hereby establish limits, procedures and conditions under which the various permits authorized by sections 348.26 and 348.27, Wis. Stats., may be issued.

(2) Permits for the movement over state trunk highways of vehicles and loads exceeding limits or conditions established hereby shall be issued only on specific authorization by the commission.

(3) In the interest of uniformity and brevity, the commission hereby establishes the following conditions relating to more than one type of permit, which conditions become effective by reference thereto in the section of the rules relating to the specific type of permit:

* * *

(a) 2. Requests for amendments to permits shall be submitted in writing to the authority issuing the permit.

(b) *Authorization to issue permits.* The authorization for the issuance of permits shall be as stated in the sections relating to each specific type of permit.

(c) *General limitations on issuance of permits.* 1. Except for general permits (Hy 30.06), industrial interplant permits (Hy 30.08), pole and pipe transportation permits (Hy

30.10), vehicle transportation permits (Hy 30.12) and double bottom milk truck permits (Hy 30.18), permits shall not be issued nor valid for the transporting of loads or articles which could reasonably be divided in such a manner as to allow transporting of the loads or articles in 2 or more loads which would not exceed statutory size and weight limits, nor shall permits be issued or valid for the transporting of more than one article if the vehicle and load exceed statutory weight limits.

* * *

2. Except as specifically authorized in sections Hy 30.02, Hy 30.04, Hy 30.06, Hy 30.14 and Hy 30.18, permits shall not authorize the operation of more than 2 vehicles in combination.

* * *

3. (d) *Insurance and liability conditions.* 1. In applying for and accepting a permit, the permittee agrees to pay any claim for any bodily injury or property damage for which he is legally responsible resulting from operations under the permit and to save the state and its subdivisions harmless from any claim which may arise from operations over public highways under the permit.

* * *

(e) *General conditions.* 1. The maximum size limitations and the maximum axle, axle combination and vehicle weights authorized by a permit shall not be exceeded. A divisible load, consisting of articles none of which exceeds statutory size limits, may not be transported under a permit.

2. Permits issued by the commission authorize the use of any of the highways of the state, subject to the limitations stated in the permit.

* * *

Hy 30.02 Single trip permits.

* * *

(2) *Authorization to Issue Single Trip Permits.* The officer or agency authorized by section 348.26, Wis. Stats., may issue single trip permits for operation over specific classes of highways as provided in said section. Single trip permits for transportation over state trunk highways may be issued as follows:

* * *

(3)(b) Single trip permits may be issued for the transportation of a vehicle combination, consisting of 3 empty vehicles in transit from manufacturer or dealer to purchaser or dealer, or for the purpose of repair. The towing vehicle shall be a truck-tractor or a road tractor.

* * *

Hy 30.04 Annual permits.

* * *

(2) *AUTHORIZATION TO ISSUE ANNUAL PERMITS.* The chief traffic engineer or his authorized representatives may issue annual permits subject to such size, weight and other limitations as the commission may, from time to time, prescribe.

(3) *GENERAL LIMITATIONS ON ISSUANCE OF ANNUAL PERMITS.* The issuance of annual permits shall be subject

to the general limitations stated in Wis. Adm. Code sections Hy 30.01 (3) (c) 1, 2 and 3, and the following:

(a) Annual permits shall not be issued for house trailers, mobile homes, travel trailers or camper trailers.

(b) Annual permits may be issued for self-propelled carry-all scraper, provided that no single axle may exceed 35,000 pounds.

* * *

Hy 30.06 General permits.

* * *

(2) AUTHORIZATION TO ISSUE GENERAL PERMITS. (a) The officer of agency authorized by section 348.27, Wis. Stats., may issue general permits for operation on highways for the maintenance of which the officer or agency is responsible.

* * *

(3)(b) General permits may be issued for loads which exceed statutory size or weight limitations or both.

* * *

(d) General permits may be issued for the operation of a vehicle combination consisting of three empty vehicles in transit from manufacturer or dealer to purchaser or dealer or for the purpose of repair. The towing vehicle shall be a truck-tractor or a road tractor.

* * *

Hy 30.08 Industrial interplant permits.

* * *

(3) GENERAL LIMITATIONS ON ISSUANCE OF INDUSTRIAL INTERPLANT PERMITS. The issuance of industrial interplant permits shall be subject to the general limitations stated in Wis. Adm. Code sections Hy 30.01 (3) (c) 2, 3 and 4, and the following:

* * *

(5)(a) The size limitations on vehicles which may be operated on a public highway under an industrial interplant permit will be determined in each particular instance by the commission.

* * *

Hy 30.10 Pole and pipe transportation permits.

* * *

(2) AUTHORIZATION TO ISSUE POLE AND PIPE TRANSPORTATION PERMITS. The chief traffic engineer or his authorized representatives may issue pole and pipe transportation permits subject to such size and other limitations as the commission may, from time to time, prescribe.

* * *

Hy 30.12 Vehicle transportation permits.

* * *

(2) AUTHORIZATION TO ISSUE VEHICLE TRANSPORTATION PERMITS. The chief traffic engineer or his authorized representatives may issue vehicle transportation permits subject to such size and other limitations as the commission may, from time to time, prescribe.

(3) GENERAL LIMITATIONS ON ISSUANCE OF VEHICLE TRANSPORTATION PERMITS. The issuance of vehicle transportation permits shall be subject to the general limitations stated in Wis. Adm. Code sections Hy 30.01 (3) (c) 2, 3 and 4, and the following:

(a) Vehicle transportation permits will be issued only to auto carriers operating "haulaways" specially constructed to transport motor vehicles and for vehicles which exceed the maximum limitations on length of vehicle and load imposed by chapter 348, Wis. Stats.

* * *

Hy 30.14 Trailer-train permits.

* * *

(2) AUTHORIZATION TO ISSUE TRAILER TRAIN PERMITS.

(a) The officer or agency authorized by section 348.27 (6), Wis. Stats., may issue trailer-train permits for operation on highways for the maintenance of which the officer or agency is responsible.

(b) The chief traffic engineer or his authorized representatives may issue trailer-train permits for movement on the state trunk highway system, subject to such size and other limitations as the commission may, from time to time, prescribe.

(c) Trailer-train permits issued by local authorities for transportation over highways outside of the corporate limits of cities and villages shall not be valid until approved by the commission or its authorized representatives. The chief traffic engineer and his authorized representatives may approve trailer-train permits issued by local authorities.

(3) GENERAL LIMITATIONS ON THE ISSUANCE OF TRAILER-TRAIN PERMITS. The issuance of trailer-train permits shall be subject to the general limitations stated in Wis. Adm. Code sections Hy 30.01 (3) (c) 2 and 4, and the following:

(a) Trailer-train permits shall be issued only for the operation of vehicles used for the transporting of municipal refuse or waste, or for the interstate or intrastate operation without load of vehicles in transit from manufacturer or dealer to purchaser or dealer, or for the purpose of repair.

(b) Trailer-train permits shall not be issued for wagons used in connection with seasonal agricultural industries.

(4) INSURANCE AND LIABILITY CONDITIONS. Trailer-train permits are issued subject to the insurance and liability conditions set forth in Wis. Adm. Code sections Hy 30.01 (3) (d) 1, 2, 3, 4, 5 and 6, and the following:

(a) The permittee will be required to certify and may be required to present satisfactory written evidence that at least the following insurance coverage or in lieu thereof a bond in a form satisfactory to the authority issuing the permit, is or will be in full force and effect on the vehicles and load designated in the permit while operating on the public highway:

Bodily injury liability — each person.	\$100,000
Bodily injury liability — each accident.	300,000
Property damage liability — each accident.	100,000

(5) GENERAL CONDITIONS. Trailer-train permits are issued subject to the general conditions set forth in Wis. Adm. Code section Hy 30.01 (3) (e) 1, 3, 4, 5, 8, 9, 10, 11, 12, 17, 20, 22, 23, 24, 25, 26, 27, and 30, and the following:

(a) A trailer-train permit issued by the division of highways for a movement which is partly on the state highway system and partly on other classes of highways, is valid only on state highways.

(b) The total length of trains consisting of truck-tractors, tractors, trailers, semitrailers, or wagons operating under the terms of a trailer-train permit and the number of vehicles in such a trailer-train determined by the authority issuing the permit shall not be exceeded, and in no event shall the overall length of the train of vehicles exceed 100 feet. The height and width of the such vehicles shall not exceed statutory limits.

(c) Trailer-trains operating under a permit shall carry in addition to any lights prescribed by Wisconsin Statutes and by the valid ordinances of the municipalities in which they are operated, a red light or approved reflective signal on each side of each trailer so placed as to make the trailer visible from all sides.

(d) A trailer-train permit is valid only for the vehicle(s) described upon the application and permit.

Hy 30.18 Double bottom milk truck permits. (1) APPLICATION REQUIREMENTS. The application requirements for double bottom milk truck permits shall be as set forth in Wis. Adm. Code section Hy 30.01 (3) (a), and the following:

* * *

(3) (a) Double bottom milk truck permits shall be issued only for the operation of a combination of three vehicles used for the transporting of milk from the point of production to the point of first processing, when the issuance of permits is deemed consistent with highway safety considering prevailing traffic conditions.

(b) Double bottom milk truck permits shall be issued only to vehicle combinations which do not exceed statutory size and weight limitations.

* * *